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Supreme Court, U.S.
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No. 99-2047

IN THE

Supreme Court of the United States

ANTHONY PALAZZOLO,
Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TAVARES,
General Treasurer, and
COASTAL RESOURCES MANAGEMENT COUNCIL,
Respondents.

On Writ of Certiorari
to the Supreme Court of Rhode Island

BRIEF OF THE AMERICAN PLANNING ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, RHODE ISLAND CHAPTER OF THE AMERICAN PLANNING ASSOCIATION, AND CALIFORNIA STATE ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE [1]

The American Planning Association (APA) is a nonprofit, educational research organization designed to advance state and local land-use planning. With more than 30,000 members, it is the oldest and largest organization in the United States devoted to fostering livable communities through comprehensive planning. Because its members serve government agencies and landowners, the APA seeks to preserve the proper role of government in protecting our communities as well as constitutional protections for private property. The Rhode Island Chapter of the APA is an APA affiliate established to advance comprehensive planning in the State of Rhode Island.

The International Municipal Lawyers Association (IMLA) is a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935. IMLA members include attorneys from more than 1400 municipalities across the country, and IMLA serves as the legal voice for the nation's local governments. The California State Association of Counties (CSAC) is a non-profit corporation whose membership consists of all 58 California counties. IMLA and CSAC have a vital interest in legal issues that affect local officials.

Our nation's planners and local officials "have long engaged in the commendable task of land use planning," *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994), and thus bring an important perspective to regulatory takings issues. Planners and local officials have a strong interest in ensuring that this Court's ripeness jurisprudence continues to

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[1] Counsel for the parties did not author this brief in whole or in part. No person or entity other than the amici, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of amicus briefs, and they filed a letter reflecting consent with the clerk.

recognize that land-use agencies are flexible institutions and that land-use disputes should be resolved through these institutions where possible. Amici also have a direct stake in ensuring that the Court's narrow "total taking" rule remains appropriately tailored so that it does not undermine legitimate community protections. Planners and local officials similarly seek to preserve the bedrock principle that a pre-existing state law may shape property interests in ways that fundamentally affect takings analysis.

STATEMENT OF THE CASE

We adopt the statement of the case set forth in respondents' brief. Below we clarify four points obscured by petitioner's brief that have special significance to the issues addressed herein.

First, petitioner mischaracterizes the nature of his takings claim. He repeatedly asserts that the claim is based on the 1986 denial by the Coastal Resources Management Council (CRMC) of petitioner's application to build a private beach club. Pet. Br. 8 nn.3 & 4, 15 n.7. The beach-club proposal required destruction of 11.4 acres of wetlands to allow for a fifty-car parking lot, port-a-johns, and other facilities. *Id.*; J.A. 32-33. At the heart of petitioner's case *as litigated*, however, is his desire to destroy all 18 acres of the fragile coastal wetlands on the site to build a 74-unit residential subdivision. In answers to interrogatories, he asserted that he seeks about $9 million in compensation, a figure derived from the subdivision plan. J.A. 47-48. In his opening statement to the trial court, petitioner's counsel referred to the development at issue as "need[ing] fill to be able to construct homes." *Id.* at 58. Petitioner's valuation evidence is based exclusively on the subdivision plan (J.L. No. 1, Tab 7, at 14, 17, 24), and the record is silent as to the economic viability of the beach club. Following petitioner's lead, the state trial court and supreme court quite naturally found that petitioner's

takings claim is rooted in his proposal to destroy all 18 acres of wetlands to build a subdivision, and they resolved the case on this basis. *E.g.*, Pet. App. A-2, A-5, A-11, A-13, B-1, B-10 to B-11. In seeking review by this Court, petitioner cited these very rulings to emphasize that his claim is based on the state's denial of permission to destroy all 18 acres of wetlands. Reply to Opposition to Petition for Writ of Certiorari ("Reply to Opp.") at 5-6.

Second, petitioner repeatedly asserts that it is undisputed that CRMC would permit only one house to be built on the property. Remarkably, he quotes the state supreme court's observation that petitioner could "build *at least* one single-family home" (Br. 13, quoting Pet. App. A-11 (emphasis added)), but then somehow concludes that it is "perfectly clear" that he may build *only* "one single family home and nothing more." Br. 13. The record shows, however, that petitioner could have applied to develop other portions of the property. One upland portion of the property—the one that everyone agrees may be used for a single-family home—consists of Lots 127-28 near the end of Shore Gardens Road. TR 190-91, 610-11; Pet. App. at B-9. A second potentially developable portion of the property—nowhere mentioned in petitioner's brief or petition for certiorari—consists of Lots 68-71. TR 610-12. Petitioner could have applied for permission to build additional homes on these lots. *Id.* Moreover, because petitioner has never submitted an accurate survey of the property, the record is silent as to whether there are other buildable upland portions on the site. TR 190. The permissible uses of the land are not undisputed as petitioner contends, but unknown.

Third, petitioner obscures the relevant property acquisition date. In seeking a writ of certiorari, petitioner "readily concede[d] for purposes of review in this Court that he became the 'owner' of the property in 1978, *after* the enactment of regulations in place limiting his ability to develop his property." Reply to Opp. at 2. His opening brief

on the merits, however, muddles the issue. At times he asserts that he acquired the property "in 1959 and 1960" (Br. 2) and has "attempted to develop it since 1961" (Br. 1). Elsewhere, he acknowledges that he acquired the property in 1978 when the preceding owner, Shore Gardens, Inc. (SGI), dissolved. Pet. Br. 21. Throughout this litigation, petitioner has tried to play it both ways, but the state courts did not permit him to do so. *See* Pet. App. B-12 (trial court: "The plaintiff cannot claim that he owned the property for one purpose and that SGI owned the property for another purpose."); *accord*, *id.* at A-14 to A-15 & n.8 (supreme court: same).

Fourth, the trial court found that petitioner's proposed destruction of 18 acres of wetlands would constitute a public nuisance. Pet. App. B-11. The septic systems needed for the subdivision would threaten contamination of the groundwater, the sole source of drinking water for the community. *Id.* at B-10 to B-11; J.A. 80-88. Even without the septic systems, the destruction of 12% of Winnapaug Pond's wetlands would significantly reduce commercial and recreational shellfish and finfish populations. *Id.* Based on these facts, the trial court found that the proposed subdivision would be a public nuisance because it "would not be suitable for the locality of the subject property." Pet. App. B-11.

SUMMARY OF ARGUMENT

This Court's ripeness cases "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351 (1986). Although petitioner contends that the extent of permitted development is undisputed—one single-family house—this assertion is false. Petitioner's claim is unripe because he failed to apply for permission to build on other portions of his property, a

failure that leaves the record hopelessly incomplete regarding the permissible uses of the property. Moreover, although petitioner's claim is rooted in a plan to build a 74-unit subdivision, he failed to submit even one meaningful application for residential use.

The categorical rule of takings liability set forth in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), applies only in the "extraordinary circumstance" where regulation deprives land of all economically viable use. *Id.* at 1017. If the land retains some productive value, the categorical rule is inapplicable. *Id.* at 1019 n.8. The Supreme Court of Rhode Island correctly concluded that no *Lucas* taking occurred because petitioner's land was worth at least about $200,000 due to the undisputed ability to build at least one house on the property.

The state's wetland protection laws, which were enacted prior to petitioner's 1978 acquisition of the property from SGI, are background principles of law that shape his property interest and preclude takings liability. Treating Rhode Island's wetland protection laws as background principles is especially appropriate because they are designed to prevent nuisances and nuisance-like activity. Excluding positive law from the background-principles inquiry would improperly elevate common law over statutory law and render the inquiry an outdated remnant of a bygone era. This Court has held that a state statute or regulation may define and limit property interests for purposes of constitutional analysis. *E.g. Board of Regents v. Roth*, 408 U.S. 564 (1972). Treating positive law as background principles promotes appropriate finality and repose by precluding takings challenges to laws decades after enactment by owners far down the chain of title. Nothing in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), alters this analysis because that case confirms the legitimacy of treating pre-existing laws as background principles.

ARGUMENT

I. PETITIONER'S TAKINGS CLAIM IS UNRIPE.

A. This Case Is Unripe Because the Record Fails to Reflect the Permissible Uses of the Property.

Petitioner's ripeness argument is premised on the assertion that the only permissible use of his property is the construction of one single-family home. He repeatedly states (Br. 10-20) that it is "undisputed" that CRMC would permit only one house on the property, on Lots 127-28.

This assertion is false. The permissible uses of the land remain uncertain precisely because petitioner has failed to pursue them. For example, a second potentially developable portion of the property—nowhere mentioned in petitioner's brief or petition for certiorari—consists of Lots 68-71. TR 610-12. Petitioner could have applied for permission to build on these lots, *id.*, but he has never done so. Moreover, because petitioner never submitted an accurate survey of the property, there may be other buildable upland portions that are not reflected in the record. TR 190. It is remarkable for petitioner to contend that the permissible use of the land is "undisputed" given that petitioner has failed to disclose to CRMC and the courts the amount of potentially developable upland property on the site. To this day, petitioner still describes the site as having an "indeterminate amount of uplands." Pet. Br. 3.

Petitioner *never* submitted a reasonable proposal limited to houses on Lots 68-71, 127-28, or elsewhere on the property. Instead, petitioner pursued two extravagant proposals. In 1983, he applied for the most environmentally harmful proposal imaginable: the destruction of all 18 acres of coastal wetlands. In 1985, he proposed to destroy more than half the wetlands to build a private beach club. Petitioner evidently recognizes that these proposals had virtually no chance of

approval under state law. Pet. Br. 12 (in denying the applications "CRMC was merely executing its statutory 'mandate' * * *.") Because petitioner never pursued a reasonable land-use proposal consistent with state law, the record is silent as to whether CRMC would have approved it.

Petitioner's failure to apply for less intense development presents a textbook case of an unripe takings claim. In *MacDonald*, this Court held that its ripeness precedents "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." 477 U.S. at 351. To ripen a regulatory takings claim, the landowner must obtain "a final decision regarding how it will be allowed to develop its property." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190 (1985). This requirement "is compelled by the very nature of the inquiry required by the Just Compensation Clause." *Id.*

MacDonald emphasizes that "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." 477 U.S. at 353 n.9. Thus, multiple applications are sometimes necessary to obtain the requisite determination as to "the type and intensity of development legally permitted on the subject property." *Id.* at 348. In *MacDonald*, the Court deemed unripe a takings challenge to the rejection of a 159-unit subdivision proposal because the applicable laws allowed for the possibility of less intense development. *Id.* at 352 n.8. The *MacDonald* court also observed that a landowner would not have a ripe takings claim upon the denial of permission to build just "five Victorian mansions" if less intense use might be approved. *Id.* at 353 n.9.

These ripeness requirements derive in large measure from the Court's recognition that land-use commissions are "singularly flexible institutions," *MacDonald*, 477 U.S. at 350, with a "high degree of discretion * * * in softening the

strictures of the general regulations they administer." *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 738 (1997). Land-use boards reflect "a tradition of pragmatic day-to-day dialogue" and employ a variety of flexible tools to accommodate competing concerns. James E. Brookshire, *The Delicate Art of Balance—Ruminations on Change and Expectancy in Local Land Use*, 38 Wm. & Mary L. Rev. 1047, 1047-48, 1082-98 (1997). The land-use process resembles alternative dispute resolution by using the informality of local government to mediate between developers and neighboring property owners. Carol M. Rose, *New Models for Local Land Use Decisions*, 79 Nw. U. L. Rev. 1155, 1168-71 (1985). Land-use boards also promote the participation of the local citizenry in the resolution of land-use disputes in ways unavailable to the judicial system. *Id.*

Petitioner suggests (Br. 18-20) that a takings claimant may circumvent this Court's ripeness requirements through the simple expedient of submitting a single land-use proposal and then alleging that any other land use is unviable, thereby rendering any additional applications (in his view) "legally irrelevant." On this theory, a landowner could apply for the most intense use imaginable, and then demand a trial on a takings claim merely by alleging that the most intense use is the only economically viable use. In *MacDonald*, however, the landowner unsuccessfully attempted this gambit, alleging in its complaint that it "was deprived of all beneficial use of its property." 477 U.S. at 352 n.8. The allegation was unavailing because the Court deemed the takings claim unripe due to the landowner's failure to pursue other permissible land uses.

The only exception to the requirement to pursue less intense land use is where it would be futile to do so. *Id.* Futility in this context refers to the inability to obtain government approval for any use of the land. *Id.* The futility

exception is not triggered by a mere allegation that a permitted use might be economically unviable. In *MacDonald* itself, the claimant's conclusory allegations of futility were insufficient to overcome the suggestion of the applicable laws that "not all development had been foreclosed." *Id.* at 352 n.8. The vast majority of lower court rulings confirm that a landowner may not skirt applicable ripeness requirements as easily as petitioner suggests. [2]

B. Petitioner Failed to Submit Even One Meaningful Application Needed to Ripen His Takings Claim.

Petitioner's claim contravenes this Court's ripeness requirements at an even more basic level because petitioner failed to submit even one meaningful application needed to ripen his takings claim.

To evaluate this matter, the Court must first determine the nature of petitioner's claim. The trial court found that petitioner's claim is that CRMC's "denial of his application to fill approximately 18 acres of wetlands * * * constitutes an inverse condemnation taking." Pet. App. B-1. The state supreme court similarly viewed the claim as alleging "that the CRMC's denial of [the] application to fill eighteen acres of coastal wetlands constituted a taking." *Id.* at A-2. The high court repeatedly based its analysis on petitioner's residential subdivision plan. *Id.* at A-5, A-11, A-13 & n.7. In seeking review by this Court, petitioner cited these rulings to stress that his claim is based on CRMC's denial of permission to fill

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[2] *E.g. Gilbert v. City of Cambridge*, 932 F.2d 51, 61 (1st Cir. 1991) ("To come within the [futility] exception, a sort of inevitability is required: the prospect of refusal must be certain (or nearly so)."); *Hoehne v. County of San Benito*, 870 F.2d 529, 533-35 (9th Cir. 1989) (futility showing must demonstrate that the agency has "drawn the line, clearly and emphatically, as to the sole use to which [the property] may ever be put.").

all 18 acres of wetlands. Reply to Opp. at 5-6. Indeed, in deeming the case unripe, the state supreme court emphasized that "although Palazzolo claimed that his property was taken when he was denied permission to develop a seventy-four-lot subdivision, he never applied for permission to develop such a subdivision." Pet. App. A-11.

Petitioner's only response to this key ruling by the high court occupies a mere footnote in his opening brief. Br. 15 n.7. There, he suggests that the takings claim actually challenges the denial of permission to fill only 11.4 acres of wetlands to build a beach club. *Id.*; *see also id.* at 6, 8 nn.3 & 4. Yet the record contains no evidence regarding the economic viability of a beach club or the value of the property with a beach club on it. Instead, petitioner's valuation evidence assumes that the land will be used for a subdivision. J.L. No. 1, Tab 7, at 14, 17, 24. Petitioner's obfuscation on this score is understandable because he never applied to build a 74-unit residential subdivision. In the face of the lower court findings and holdings, which were based on petitioner's own representations and litigation strategy, petitioner's current assertions regarding the nature of his claim appear to be a post-trial rationalization to rescue an unripe claim.

Ripeness jurisprudence does not allow a takings claimant to engage in this bait-and-switch strategy. For example, in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Court declined to reach the merits of an as-applied takings challenge to zoning ordinances because the claimants failed to apply for permission to build houses as allowed under the ordinances. *Id.* at 260. Because the takings claim focused on residential development, the claimants were required to determine the extent to which the challenged laws allowed for such development. *Id.* There is no suggestion in *Agins* that the takings challenge would have been ripe if they instead

applied for permission to build a beach club or other project unrelated to their claim.

MacDonald, too, emphasizes that a takings claimant must submit at least one "meaningful application" to ripen a takings claim. 477 U.S. at 353 n.8. Needless to say, a land-use application is not "meaningful" if it allows a landowner to sandbag state and local officials by submitting one proposal and then using denial as a springboard for a sweeping takings claim based on a much more intensive use. One key purpose of the Court's ripeness rules is to encourage resolution of land-use disputes at the state and local level. To achieve this goal, a "meaningful" application should give land-use officials fair notice of the real stakes involved.

A meaningful application also should yield an adequate administrative record upon which to resolve a subsequent takings claim. *MacDonald*, 477 U.S. at 348-51. Petitioner's failure to apply for residential development, however, has resulted in a glaringly deficient record. The Supreme Court of Rhode Island concluded that petitioner's asserted land value is entirely "speculative" because the proposed subdivision is inconsistent with applicable zoning laws. Pet. App. A-13. It is not at all clear that local authorities would permit 74 homes to be built on the land. *Id.* at A-13 n.7. In view of these and other critical deficiencies in the record, petitioner should not be allowed to pursue a takings claim based on a residential subdivision plan he never pursued.

One final point deserves emphasis. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), the Court expressed concern about a landowner becoming unfairly entangled in local land-use procedures. *Id.* at 694-98, 722. This is not such a case. It is petitioner who has proceeded in blatant disregard of basic requirements designed to protect neighboring property owners and the public from harmful land use. Petitioner's applications lacked basic information (Pet. App. B-2), and were consistently "vague,"

"inadequate," and "very poor." J.A. 7, 61-66. He submitted applications virtually identical to previously denied applications for no good reason. Pet. App. A-5, A-12 n.6. He failed to prosecute his court challenges in a diligent and timely fashion. *See Palazzolo v. CRMC*, 657 A.2d 1050, 1052 (R.I. 1995) (noting the "justified frustration of the court and counsel for defendants" due to the "dereliction" of petitioner's previous counsel). Worst of all, he hid the ball from coastland protection officials regarding his true development intentions to build a 74-unit residential subdivision. The delay and expense incurred by all involved, as well as the gaping holes in the record, largely are due to petitioner's own actions. Because he refused to abide by the rules that apply to all landowners, his takings claim remains unripe.[3]

[3] In addressing the ripeness issue, the amicus brief of the National Association of Home Builders (pp. 21-22, 27) purports to rely on APA's amicus brief in *Suitum*. In September 1997, however, the APA publicly repudiated key portions of that brief because it did not accurately represent the APA's views. The APA hereby reaffirms its disavowal of the *Suitum* brief. The instant brief represents the APA's established positions on these issues.

The NAHB also asserts (Br. 2) that federal courts dismiss 83% of takings cases on procedural grounds, but in the overwhelming majority of the cases relied on by the NAHB, the claimant failed to seek compensation in state court first as required by *Williamson County*. *See* S. Rep. No. 105-242, at 42-43 (1998) (minority views) (analyzing distortions in NAHB's ripeness statistics). Space limitations preclude a comprehensive response to the NAHB's other mischaracterizations of the case law, but an example will suffice. In *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992), cited at NAHB Br. 21, the developer offered an environmentally destructive subdivision proposal on a take-it-or-leave-it basis and then sued, forsaking other options that would have allowed for a similar subdivision consistent with applicable laws. *Id.* at 39-92, 98-99. The Second Circuit reasonably held that the developer should apply for permissible land uses before suing for a taking. *Id.* at 98-99. Any fair reading of the case undercuts the NAHB's assertion that it shows a need for a radical revision of ripeness doctrine.

II. THE *LUCAS* "TOTAL TAKING" RULE IS BOTH CLEAR AND NARROW, AND IT DOES NOT APPLY TO THIS CASE.

A. *Lucas* Does Not Guarantee Developers a Reasonable Return on Their Investment Properties.

This Court in *Lucas* faced the "extraordinary circumstance," 505 U.S. at 1017, where a land-use regulation left petitioner's property "valueless." *Id.* at 1020. Relying on *Agins*, 447 U.S. at 260, the Court held that where a regulation allows "*no* productive or economically beneficial use of land," *Lucas*, 505 U.S. at 1017, compensation generally must be paid unless the regulation is justified by background principles of law. *Id.* at 1027-32. *Lucas* thus established a bright-line, categorical rule for what this Court termed a "total taking." *Id.* at 1030. This bright-line rule, as this Court itself, numerous other courts, and commentators have all recognized, covers a very narrow range of regulations. *See, e.g., id.* at 1018; *District Intown Properties Ltd. Partnership v. District of Columbia*, 198 F.3d 874, 882 (D.C. Cir. 1999), *cert. denied*, 121 S. Ct. 34 (2000); Richard A. Epstein, Lucas v. South Carolina Coastal Council: *A Tangled Web of Expectations*, 45 Stan. L. Rev. 1369, 1369-77 (1993) (*Lucas* rule does not apply unless regulation deprives land of all value).

Importantly, regulations that do not amount to a "total taking" and therefore do not trigger the narrow *Lucas* rule may nonetheless require compensation. To determine whether regulations that deprive landowners of some, but not all, economically beneficial uses of land require compensation, this Court applies the three-part test set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104,

124 (1978). Under this test, the Court considers the economic impact of the regulation, the extent to which the regulation interferes with distinct investment-backed expectations, and the character of the government action. *Id.* This third factor requires, as the Court described in *Lucas*, 505 U.S. at 1015, "case-specific inquiry into the public interest advanced in support of the restraint." Thus, to determine whether compensation is due outside of the "extraordinary circumstance" of a total taking, this Court has required that the public interest be weighed alongside the economic effects of a regulation in order to make a practical determination of whether compensation should be paid in a particular case.

The relationship between *Lucas* and *Penn Central* is important to stress because petitioner and supporting amici at times suggest that unless the *Lucas* categorical rule is expanded to cover more than "total takings," the government could willy-nilly deprive landowners of just less than 100% of the value of their property without paying compensation. This is simply wrong, and this Court said as much in *Lucas*, when it responded to Justice Stevens's suggestion in dissent that only landowners who suffer a complete deprivation of value are entitled to compensation. *See Lucas*, 505 U.S. at 1019 n.8. This Court explained that, while the landowner who suffers a 95% diminution in value could not take advantage of the narrow categorical rule of *Lucas*, that landowner still might be owed compensation pursuant to *Penn Central*. *Id.* Thus, when the American Farm Bureau Federation and Rhode Island Farm Bureau, in their amicus brief at 15-16, suggest with alarm all the ways in which a government could avoid a compensable taking by leaving owners with "tiny remnants of their land," they are simply ignoring the role that *Penn Central* plays in takings analysis.

A straightforward application of *Lucas* to the undisputed facts of this case demonstrates beyond peradventure that petitioner is not entitled to the "total taking" rule established

in *Lucas*. Instead, petitioner's case—assuming for argument's sake that it is ripe and that background principles of state law do not preclude a takings claim—must be analyzed pursuant to *Penn Central*. Uncontradicted evidence introduced during the trial indicated that petitioner may build at least one home on the property, and that therefore the property was worth at least about $200,000 as of 1986. *See* Pet. App. A-13, B-5; J.A. 103-04.[4] Accordingly, the regulation at issue in this case, unlike the one at issue in *Lucas*, obviously did not deprive petitioner of "*all* economically beneficial uses" of his land. *See Lucas*, 505 U.S. at 1019. Petitioner therefore has not suffered a "total taking" and cannot take advantage of the narrow categorical rule of *Lucas*.

Petitioner seeks to avoid this straightforward application of *Lucas* by arguing that compensation must be paid whenever regulations interfere with the ability of developers to realize a "reasonable return" on their investment properties. *See* Pet. Br. 37-40. This argument is plainly contrary to *Lucas*, as even a casual reading of that opinion indicates. Indeed, if petitioner's reading of *Lucas* were correct, surely this Court's response to Justice Stevens's point in *Lucas* would have been different—i.e., if *Lucas* applied whenever regulations failed to guarantee a reasonable return to developers, then the person whose property suffered a 95% diminution in value probably would be entitled to compensation, as the landowner

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[4] Evidence also indicated that the portion of petitioner's land that could not be developed was worth approximately $157,500 as an open-space gift. *See* Pet. App. A-13. Amicus Curiae Institute for Justice (IJ) argues strenuously that this remaining value does not suffice to preclude a total taking under *Lucas*, because *Lucas* "requires compensation when the land has been deprived of all beneficial *use*.". IJ Br. at 25. Although Amicus IJ misreads *Lucas*, insofar as that case established a rule for a regulation that left Lucas's land "valueless," the more important point is that Amicus IJ misreads *this case*. Because petitioner could build at least one home on his property, he has not been deprived of all beneficial *use* of his property.

who suffered such a diminution likely would have been deprived of a "reasonable return" on his investment.[5] In addition, contrary to petitioner's half-hearted implication, Pet. Br. 40, this Court's decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), offers no support for his adventurous reading of *Lucas*. There is no hint whatsoever in that decision that regulations that fail to provide developers a "reasonable return" should be considered a "total taking" and automatically require compensation.

Perhaps most importantly, accepting petitioner's argument would effectively require *Penn Central* to be overruled. By suggesting that compensation should be paid whenever a regulation deprives a developer of a "reasonable return," petitioner is attempting to avoid the multifactor test mandated by *Penn Central* by converting one of the three factors considered in that test—economic impact—into a new categorical test. To be sure, this transformation would work to petitioner's advantage, insofar as it would preclude consideration of the public interest in support of the regulation, which could counterbalance the economic impact of the regulation. But this transformation would eviscerate *Penn Central* and, indeed, the entire body of regulatory takings jurisprudence upon which that decision and subsequent decisions rest. *See Lucas*, 505 U.S. at 1015. Petitioner has offered no good reason for such a drastic and radical departure from this Court's traditional approach to

[5] Petitioner's reading of *Lucas* also rests on the assumption that this Court sought to establish a rule beyond that necessary to decide the case in *Lucas*, for the simple reason that the regulation at issue in *Lucas* rendered Lucas's land valueless. In addition to the fact that the *Lucas* opinion belies this assumption, it seems quite implausible that an opinion authored by one of this Court's most serious champions of judicial restraint, Justice Scalia, would have sought to cover a universe of cases not before the Court in *Lucas*.

regulatory takings. *Cf. Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992) (explaining the limited circumstances under which this Court should depart from precedent).

B. In Order to Determine Whether a Regulation Effects a Taking, the Entire Parcel of Land Must Be Considered.

Petitioner offers another radical suggestion in an attempt to shoehorn his case into the categorical rule of *Lucas*. He argues that the Court should examine only that portion of his property that is affected by the regulation to determine whether his property has been taken. *See* Pet. Br. 46-47. In *Lucas*, this Court indicated that the so-called denominator problem remained unsettled. *See* 505 U.S. at 1016 n.7. This description of the law was somewhat questionable, given that the Court in *Penn Central* had stated in no uncertain terms that "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." 438 U.S. at 130. Instead, "this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." *Id.* at 130-31. *Accord, Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979).

Whatever the state of the law at the time of *Lucas*, this Court has more recently confirmed the approach described in *Penn Central*. In a unanimous 1993 ruling, this Court stated that, in assessing whether a regulatory taking has occurred, "a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable." *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 644 (1993). Petitioner's argument, therefore, is directly

contrary to this Court's decisions in *Penn Central*, *Keystone*, *Andrus*, and *Concrete Pipe*, *supra*.

Were this Court's precedent ignored and petitioner's argument accepted, a host of conventional zoning laws and regulations would require compensation. Every setback requirement, for example, that requires homeowners to build their homes several feet from a road, renders unbuildable a portion of the owner's property. Under petitioner's approach, such requirements, which are ubiquitous throughout this country, would trigger compensation. *See Keystone*, 480 U.S. at 498. Similarly, regulations limiting the development of air rights, those limiting the development of wetlands, and those limiting the buildable area of a particular lot would also trigger automatic compensation. *Cf. Penn Central*, 438 U.S. at 130-31. Justice Holmes recognized, in the case giving birth to regulatory takings, that the Court should be cautious in its approach to determining when a regulation requires compensation. "Government hardly could go on," Justice Holmes explained, "if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). As a functional matter, petitioner's suggestion that the takings inquiry should examine only those portions of land affected by regulations would raise precisely the danger recognized by Justice Holmes.

Petitioner's proposed regime is flawed not only functionally but conceptually as well. It rests, at bottom, on the idea—echoed by several amici—that regulations should be treated identically to physical invasions. *See* Pet. Br. 46-47. This suggestion ignores the fact that the core, historical function of the Takings Clause was to protect against physical expropriations. *See, e.g., Lucas*, 505 U.S. at 1028 n.15 (acknowledging "that early constitutional theorists did not believe the Takings Clause embraced regulations of property

at all"); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782 (1995) (explaining that originally the Takings Clause was understood to mandate compensation only when the government physically took property); John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw. U. L. Rev. 1099 (2000) (same).

In *Mahon* and subsequent cases, this Court departed from the original understanding for practical reasons, recognizing that some regulations might be so onerous as to be the functional equivalent of a physical expropriation—hence Justice Holmes's famous aphorism that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Mahon*, 260 U.S. at 415. In attempting to discern when regulations become the practical equivalent of a physical appropriation, this Court has tethered its analysis to the language and original understanding of the Clause. Petitioner's argument, by contrast, would essentially create out of whole cloth a new right that bears no resemblance to the Takings Clause, and would effectively rewrite that provision to read: "nor shall private property *be diminished in value* for public use without just compensation." We respectfully suggest that the Court should be just as reluctant to accept this invitation to create a new right as it is to create new rights under the guise of substantive due process. *Cf. Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("We must * * * exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.") (internal quotation and citation omitted).

C. Petitioner's Argument That a *Penn Central* Taking Has Occurred Is Not Among or Fairly Included Within the Questions Presented.

In the last three pages of his brief on the merits, petitioner makes an argument that did not appear in his petition for certiorari. He argues that under the multifactor test of *Penn Central*, he deserves compensation. Pet. Br. 47-50. On its merits, this argument is not persuasive, and the Supreme Court of Rhode Island properly rejected it. Pet. App. A-17.

This Court, however, should not reach the merits of this issue because it is outside of the scope of questions presented in the petition for certiorari. *See* Sup. Ct. R. 14.1(a); *Yee v. City of Escondido*, 503 U.S. 519, 534-38 (1992). In this respect, this case is quite similar to *Yee*. In *Yee*, this Court refused to reach the question of whether a *regulatory* taking had occurred when the petition for certiorari asked the Court to consider whether a *physical* taking had occurred. *See* 503 U.S. at 537. Here, petitioner has asked this Court to consider whether a "total taking" pursuant to *Lucas* has occurred. Whether or not a taking has also occurred pursuant to the multifactor test of *Penn Central* "is a question *related* to the one petitioner[]presented, and perhaps *complementary* to the one petitioner[] presented, but it is not 'fairly included therein.'" *Id.*

III. THE STATE'S PRE-EXISTING WETLAND PROTECTION LAWS ARE BACKGROUND PRINCIPLES FATAL TO PETITIONER'S TAKINGS CLAIM.

Lucas holds that no physical or regulatory taking occurs where the challenged government action is justified by background principles of state law that shape and define the claimant's property interest. 505 U.S. at 1027-32. Here, the Supreme Court of Rhode Island (Pet. App. A-15 to A-16) correctly concluded that the state's general ban against

destroying fragile coastal wetlands—enacted before petitioner acquired the property in 1978[6]—is a background principle that deprived petitioner of a property interest to destroy those wetlands.

The *Lucas* Court illustrated the background-principles inquiry by noting that the owner of a lakebed would not be entitled to compensation if denied permission to engage in a landfill operation that would flood others' land. 505 U.S. at 1029. So long as the filling could be enjoined in the courts under established nuisance law, the landowner's bundle of rights does not embrace the right to engage in the filling. *Id.* The *Lucas* Court's hypothetical does not turn on whether the filling is prohibited by common-law nuisance or a pre-existing nuisance statute. *Id.*

The case at hand is remarkably similar to the *Lucas* hypothetical, but rather than involving flood risks, petitioner's proposed fill posed severe risks to public drinking water supplies and commercial and recreational fish populations. The trial court found that petitioner's planned subdivision would constitute a public nuisance because the requisite septic systems would threaten contamination of the groundwater, the sole source of drinking water for the community. Pet. App. B-10 to B-11; J.A. 84-88. Moreover, petitioner's proposed destruction of 12% of Winnapaug Pond's wetlands would reduce commercial and recreational shellfish and finfish populations in Rhode Island. *Id.*

In view of these findings, logic demands that Rhode Island's wetland protection laws be viewed as background principles. Positive law designed to prevent nuisances or

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[6] Petitioner "readily concedes for purposes of review in this Court that he became the 'owner' of the property in 1978, *after* the enactment of regulations in place limiting his ability to develop his property." Reply to Opp. at 2; *see also* Pet. App. A-13 to A-14 (state supreme court ruling); B-8 to B-9 (trial court ruling).

nuisance-like activity is simply an extension of common-law nuisance. The very enactment of protective statutes and regulations often truncates the development of the common law for two reasons. First, these statutory provisions put the public on notice that the covered land uses are prohibited, which reduces the number of land-use conflicts that otherwise would lead to common-law actions. Second, if a landowner engages in a prohibited use, enforcement authorities typically resort to the statutory program, not common-law nuisance, to enjoin the violation. The instant case confirms this pattern in the takings context: although the trial court found that the proposed wetland destruction is prohibited by state nuisance law (Pet. App. B-10 to B-11), the Supreme Court of Rhode Island found it unnecessary to address this determination because it properly viewed the wetlands statute as a background principle that precludes takings liability.

Indeed, some new statutes simply reassert state control over property previously subject to the same restrictions under common law. *E.g.*, *Potomac Sand and Gravel Co. v. Governor of Maryland*, 293 A.2d 241, 250 (Md. 1972) (finding no taking where a statute reasserted state control over areas previously subject to a common-law ban on dredging in marshlands, emphasizing that under the statute "riparian owners are now in the same position as they were at common law * * *"). If states had not enacted modern environmental protection regimes, their common-law doctrines would have continued to evolve to address many of the problems now addressed by regulation. As a result, excluding state positive law from the background-principles inquiry would render the inquiry an irrelevant remnant of a bygone era.

In Justice Kennedy's words, the takings inquiry should embrace "the whole of our legal tradition." *See Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring in the judgment); *see also id.* ("Coastal property may present such unique concerns

for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit."). Not surprisingly, the Restatement of Torts—cited in *Lucas*, 505 U.S. at 1030-31, as providing guidance on the background-principles inquiry—discusses many cases that rely on statutory restrictions to determine that various land uses constitute a nuisance. Restatement (Second) of Torts § 821B(2)(b) & cmts. c & e (1979 & Supps.).

Virtually every lower court that has addressed the issue since *Lucas* has treated state positive law as a background principle for purposes of takings analysis. For example, in *Kim v. City of New York*, 681 N.E.2d 312 (N.Y. 1997), New York's highest court emphasized that excluding positive law from the background-principles inquiry would render the inquiry outdated and unworkable:

> It would be an illogical and incomplete inquiry if the courts were to look exclusively to common-law principles to identify the preexisting rules of State property law, while ignoring statutory law in force when the owner acquired title.
>
> * * * *
>
> The corpus juris of this State comprises constitutional law, statutory law and common law. To the extent that each of these sources establishes binding rules of property law, each plays a role in defining the rights and restrictions contained in a property owner's title. Therefore, in identifying the background rules of State property law that inhere in an owner's title, a court should look to the law in force, whatever its source, when the owner acquired the property.

Id. at 315-16 (citations omitted). Other courts repeatedly have concluded that state statutes and regulations may be

background principles,[7] including statutes that protect wetlands and coastal property.[8]

To be sure, *Lucas* refers to the common law as an important source of background principles (505 U.S. at 1031), but *Lucas* suggests other sources as well. For example, *Lucas* relies on *Board of Regents v. Roth*, 408 U.S. 564 (1972), for the proposition that property interests are defined by state law. *Lucas*, 505 U.S. at 1030. The *Roth* court made clear that the rules that shape and define property interests include "statutory and administrative standards." *Roth*, 408 U.S. at 576-78 (state statutes governing public employment "created and defined" claimant's property interest in a way that defeats his constitutional claim). *Lucas*'s analysis of background principles also relies on *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), which holds that pre-existing state law on trade secrets—much of which is statutory[9]—defines property interests for purposes of takings analysis. *Id.* at 1012. In cases involving land, this

[7] *E.g., Outdoor Graphics, Inc. v. City of Burlington*, 103 F.3d 690, 694 (8th Cir. 1996) (due to a pre-existing ordinance, "the right to erect a billboard did not inure in [the claimant's] title"); *Hoeck v. City of Portland*, 57 F.3d 781, 789 (9th Cir. 1995) ("[u]nder the [city code provisions in effect] at the time Hoeck took title, he had no right to use his property to maintain an abandoned structure."); *Hunziker v. Iowa*, 519 N.W.2d 367, 371 (Iowa 1994) (archeological artifact protection law is a background principle that precludes takings liability).

[8] *E.g., Wooten v. South Carolina Coastal Council*, 510 S.E.2d 716, 717-18 (S.C. 1999) (state coastal zone statute is a background principle that precludes takings liability); *City of Virginia Beach v. Bell*, 498 S.E.2d 414, 417-19 (Va.) (same; dune protection ordinance), *cert. denied*, 525 U.S. 826 (1998).

[9] *See* Gale R. Peterson, *Trade Secret Protection in an Information Age* § 2.1, at p. 2-9 & n.10 (1997) (42 states and the District of Columbia have statutes governing civil trade secret protection).

Court long has recognized that state positive law may shape and limit property rights.[10]

Recognition of positive law as a source of background principles is necessary to bring repose and certainty to land-use controls and other community protections. Under petitioner's theory, an as-applied takings challenge could survive for decades, passing from owner to owner, even where each new owner takes title with notice of the restriction. Any new government effort to enforce a pre-existing limitation, no matter how entrenched in the law, could lead to new litigation. This unsettling approach could wreak constitutional havoc on state property law and land-use planning.

Consider, for instance, *Daniel v. County of Santa Barbara*, No. CV 98-9453 MMM (AJWx) (C.D. Cal. 1999) (appeal pending), which is attached as an Appendix to the Brief of the California Coastal Property Owners Association as *Amicus Curiae* in Support of Petitioner (CCPOA Br.). There, in 1974 a prior property owner accepted a coastal development permit for a four-lot subdivision and agreed as a condition of approval to dedicate a public access easement. In 1987, a subsequent property owner implemented the condition by recording an irrevocable offer to dedicate the walkway, thus eliminating the property interest from the bundle of rights that could be transferred to a subsequent owner. CCPOA Br. App. 1a-2a. Neither of the previous landowners challenged

[10] *E.g., Otis Co. v. Ludlow Mfg. Co.*, 201 U.S. 140, 152 (1906) (Holmes, J.) ("it would not be very extravagant to say that [the appropriation of streams under the Massachusetts mill act] enters as an incident into the nature of property in streams"); *Eldridge v. Trezevant*, 160 U.S. 452, 462-69 (1896) (rejecting a 14th Amendment challenge to construction of a levee due to public servitude reflected in the Louisiana Civil Code). *Eldridge* presents a stark anomaly: if background principles included only common law, how could Louisiana, a civil code state, ever properly undertake a background-principles inquiry?

the condition as a taking. The current landowners, who are now challenging the easement, purchased the property subject to these conditions in 1997. *Id.* Even though the current and previous landowners have enjoyed the benefits of the subdivision approval and residential permits for many years, the current landowners now seek to undo agreements and understandings long considered settled. Their effort to do so—nearly thirty years after the fact—seeks an unjust windfall, for as the trial court found "[t]he price plaintiffs paid for the land was presumably reduced to reflect the exaction of the irrevocable offer to dedicate and the risk that the County would accept it." *Id.* at 25a. The principles of finality, repose, and fundamental fairness strongly counsel against petitioner's position.

Finally, despite petitioner's heavy reliance on a footnote in a 1987 case, *Nollan v. California Coastal Comm'n*, 483 U.S. 825, nothing in *Nollan* alters the analysis. There, the Court determined that landowners could bring a takings challenge to a dedication requirement in a building permit notwithstanding a pre-existing policy of the coastal commission to require dedications from similarly situated landowners. *Id.* at 833 n.2.

The *Nollan* footnote is inapposite for two reasons. First, unlike the state statutes and regulations at issue here, the policy in question in *Nollan* was just that, a mere policy, *id.* at 834 n.2, which did not rise to the level of a background principle that limited the Nollans' property interests. Thus the state had no pre-existing property interest that justified the dedication. *See Kim*, 681 N.E.2d at 316 n.3. Second, the footnote does not concern background principles. It responds to Justice Brennan's argument in dissent, 483 U.S. at 858-60, that under *Monsanto* the claimants lacked an expectation to build without making the required dedication. Petitioner's reading of the footnote would virtually eviscerate the *Lucas* background-principles defense, but the footnote says nothing

about background principles, and there is nothing in *Lucas* to suggest any tension with *Nollan*. Indeed, *Nollan* expressly left open the question whether a "pre-existing public right of access" found in California's positive law (its Constitution) could be used to defend the challenged dedication. *Nollan*, 483 U.S. at 833. In this respect, *Nollan* does not undermine the background-principles defense, but confirms it. *See* Douglas T. Kendall, Timothy J. Dowling, and Andrew W. Schwartz, *Takings Litigation Handbook* 160 (2000).

CONCLUSION

The judgment of the Supreme Court of Rhode Island should be affirmed.

Respectfully submitted.

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